

Tentative Rulings for June 29, 2016
Departments 402, 403, 501, 502, 503

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

- | | |
|-------------|---|
| 14CECG01317 | <i>Moffett v. California Cancer Associates for Research and Excellence, Inc.</i> – all three motions are continued to Tuesday July 19, 2016 at 3:30 p.m. in Dept. 503. |
| 15CECG02967 | <i>Valley Children's Hospital v. Moua</i> [Hearing on motion for stay, sealing of records, and writ of possession, is continued to August 9, 2016, at 3:30 p.m. in Dept. 503] |

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 402

03

Tentative Ruling

Re: ***Calzada v. Samarin***
Case No. 13 CE CG 01848

Hearing Date: June 29th, 2016 (Dept. 402)

Motion: Defendants and Judgment Creditors' Motion for Assignment Order and for Order Restraining Judgment Debtor

Tentative Ruling:

To grant the defendants' motion for an assignment order, and for an order restraining plaintiff from encumbering the proceeds of his agreement with Western Tulare Ag Holdings, LLC. (Code Civ. Proc. §§ 708.510; 708.520.) The court also finds that defendants' lien has priority over all other liens, including the purported lien of plaintiff's counsel, Kari Ley, and thus all proceeds from the contract should be paid to defendants until the judgment is satisfied.

Explanation:

Under Code of Civil Procedure section 708.510, subdivision (a), "Except as otherwise provided by law, upon application of the judgment creditor on noticed motion, the court may order the judgment debtor to assign to the judgment creditor ... all or part of a right to payment due or to become due..." (Code Civ. Proc. § 708.510, subd. (a).) However, "A right to payment may be assigned pursuant to this article only to the extent necessary to satisfy the money judgment." (Code Civ. Proc. § 708.510, subd. (d).)

Also, under section 708.520, "When an application is made pursuant to Section 708.510 or thereafter, the judgment creditor may apply to the court for an order restraining the judgment debtor from assigning or otherwise disposing of the right to payment that is sought to be assigned." (Code Civ. Proc., § 708.520, subd. (a).) Furthermore, "The court may issue an order pursuant to this section upon a showing of need for the order. The court, in its discretion, may require the judgment creditor to provide an undertaking." (Code Civ. Proc., § 708.520, subd. (b).)

Here, the defendants have met their burden of showing that they are entitled to an assignment order. They have a valid judgment against plaintiff in the amount of \$200,000, plus interest. They also allege that plaintiff has not paid any part of the judgment, and plaintiff has not denied this allegation. There is no evidence that plaintiff's personal needs for himself or his family will prevent the assignment, or that he has to pay other judgments or wage assignments. In fact, plaintiff apparently concedes that an assignment is proper here.

Plaintiff mentions in his opposition that he intends to make a claim of exemption under section 708.550, but he has not yet filed a claim of exemption. He must file such a claim within three days of the hearing date for the motion for assignment order or the exemption will be waived. (Code Civ. Proc. § 708.550, subd. (a).) Also, at this time plaintiff has not filed an affidavit to support any claimed exemption. (*Ibid.*) Therefore, there is nothing to support any claimed exemption.

Plaintiff's primary contention in opposition to the assignment order is that his attorney has a lien against the income he expects to receive from his contract with Western Tulare Ag Holdings, LLC, and that his attorney's lien has priority over any other liens, including the defendants' judgment lien. Plaintiff relies on the assignment he made to his attorney on March 11th, 2016. (Exhibit 3 to Migliazzo decl.) However, this purported assignment was made several months after defendants obtained their judgment against plaintiff, which was filed on September 10th, 2015. (Migliazzo decl., ¶ 4.) The judgment lien and real property lien were served on plaintiff in October of 2015. (*Id.* at ¶ 12, and Exhibit 4 thereto.) The order for debtor's examination was also served on plaintiff and his counsel by personal delivery on March 18th, 2016. (*Id.* at ¶ 6, and Exhibit 1 thereto.) By contrast, notice of the purported assignment to plaintiff's attorney was not served until April 20th, 2016, so it does not have priority over the defendants' lien. (*Id.* at Exhibit 3.)

Indeed, plaintiff concedes that the assignment to his attorney was made after the judgment lien in favor of defendants. (Opposition, p. 4, lines 8-12.) However, plaintiff argues that his attorney's lien supersedes the defendants' lien because it arose out of the fee agreement related to the Western Milling litigation, which existed before the judgment lien. Plaintiff points out that an attorney's lien for payment based on a fee agreement that preexists the judgment lien will take priority over the judgment lien. (*Pangborn Plumbing Corp. v. Carruthers & Skiffington* (2002) 97 Cal.App.4th 1039, 1051.)

The fee agreement between plaintiff and his attorney for the Western Milling litigation did give a lien to the attorney "on any and all claims, causes of action or recovery that are the subject of Attorney's representation under this Fee Agreement." (Exhibit 1 to Ley decl., p. 5, ¶ 13.) Moreover, the agreement states that "Attorney's lien will be for any sums owing to Attorney for any Costs and/or attorneys' fees owed to Attorney for services in this Matter as well as Emilio Calzada v. William K. Samarin et al., Fresno County Superior Court Case No. 13CECG01848. *The lien will attach to any recovery Client may obtain, whether by settlement, arbitration award, judgment, related contractual agreement or otherwise.*" (*Ibid.*, emphasis added.) The fee agreement was executed on March 24th, 2015, before the defendants obtained their judgment against plaintiff, but after the parties entered into the written settlement agreement. (*Id.* at p. 7.) Thus, the attorney's lien would appear to have priority over the defendants' lien.

However, the attorney's lien only encumbers the proceeds that plaintiff might have obtained if he had prevailed in the Western Milling litigation or the Samarin litigation. "*The lien will attach to any recovery Client may obtain, whether by settlement, arbitration award, judgment, related contractual agreement or*

otherwise." (Fee Agreement. at p. 5, ¶ 13, emphasis added.) Yet plaintiff did not prevail in either case. Plaintiff agreed to pay \$200,000 to defendants in the Samarin action, and he agreed to pay Western Milling over \$854,000 to settle that case. (Exhibit 2 to Ley decl., p. 4, ¶ 4a.) Thus, plaintiff's counsel's lien has nothing to attach to, since plaintiff did not recover anything in either of the subject cases, and in fact plaintiff owes substantial amounts to the other parties in those cases. As a result, plaintiff's attempted assignment of his right to the income from the new contract with West Tulare Ag Holdings was ineffective, since he had no right to any recovery in the underlying cases.

Therefore, plaintiff has failed to show that defendants' assignment order should be reduced by the amount allegedly owed to his attorney, or that his attorney's lien has priority over defendants' lien. As a result, the court intends to grant the assignment order, declare that the defendants' lien has priority over any other liens including the purported lien of plaintiff's attorney, and order plaintiff not to encumber the proceeds from his income from the agreement with West Tulare Ag.

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: JYH **on** 6/27/16.
(Judge's initials) (Date)

(17)

Tentative Ruling

Re: ***Shehee v. Hamper et al.***
Court Case No. 15 CECG 03950

Hearing Date: June 29, 2016 (Dept. 402)

Motion: Defendant Arthur Hampar's Demurrer to Complaint

Tentative Ruling:

To sustain the general demurrer without leave to amend. Defendant Hampar shall submit judgment of dismissal to the court within five days of the clerk's service of this minute order.

Explanation:

A demurrer is made under Code of Civil Procedure section 430.10, and is used to test the legal sufficiency of the complaint or other pleading. (Rylaarsdam & Edmon, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2015) "Attacking the Pleadings" § 7:5.) The demurrer admits the truth of all facts properly pleaded by the plaintiffs, as well as those that are judicially noticeable. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

Defendant Arthur Hampar demurs generally to plaintiff's entire complaint for failure to state facts sufficient to state a cause of action.

Elements of a Cause of Action for Criminal Legal Malpractice:

" 'The elements of a cause of action in tort for professional negligence are: (1) the duty of the professional to use such skill, prudence, and diligence as other members of his profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional's negligence. [Citations.] [¶] If the allegedly negligent conduct does not cause damage, it generates no cause of action in tort. [Citations.] The mere breach of a professional duty, causing only nominal damages, speculative harm, or the threat of future harm—not yet realized does not suffice to create a cause of action for negligence.' " (*Jackson v. Johnson* (1992) 5 Cal.App.4th 1350, 1355, citing *Budd v. Nixen* (1971) 6 Cal.3d 195, 200.)

Here, plaintiff has not adequately pled damages resulting from Hampar's wrongdoing. The criminal action in which Hampar represented plaintiff remains ongoing¹ and plaintiff has not been convicted. However, assuming for the sake of argument that loss of a speedy trial is sufficient to state a cognizable claim of injury,

¹ Hampar requests judicial notice of the file and docket in Fresno County Superior Court Case No. F15900780. The Court grants that request pursuant to Evidence Code section 452, subdivision (d).

plaintiff still cannot state a claim, because he cannot plead and prove actual innocence and exoneration.

The California Supreme Court has held that to prove malpractice by a criminal defense attorney, the former criminal defendant must satisfy the elements of a civil malpractice claim and prove his or her actual innocence. (*Wiley v. County of San Diego* (1998) 19 Cal.4th 532, 536–545 (Wiley).) Of particular relevance here, the high court also later held that to “establish actual innocence in a criminal malpractice action,” the individual convicted of the criminal offense must first “obtain reversal of his or her conviction, or other exoneration by postconviction relief[.]” (*Coscia v. McKenna & Cuneo* (2001) 25 Cal.4th 1194, 1199–1201 (Coscia).) The Supreme Court explained: “[T]he requirement of exoneration by postconviction relief protects against inconsistent verdicts—such as a legal malpractice judgment in favor of a plaintiff whose criminal conviction remains intact—that would contravene ‘a strong judicial policy against the creation of two conflicting resolutions arising out of the same or identical transaction.’ [Citation.]” [Citation.] This requirement also promotes judicial economy. Many issues litigated in the effort to obtain postconviction relief, including ineffective assistance of counsel, would be duplicated in a legal malpractice action; if the defendant is denied postconviction relief on the basis of ineffective assistance of counsel, collateral estoppel principles may operate to eliminate frivolous malpractice claims.” (*Id.* at p. 1204.) Accordingly, “an intact conviction precludes recovery in a legal malpractice action.” (*Ibid.*)

All of Plaintiff's Claims Sound in Legal Malpractice

Plaintiff explicitly alleges “legal malpractice” and “negligent infliction of emotional distress” in his complaint. However, he also incorporates allegations that Hampar breached various duties, including the duty of loyalty and the duty to keep his client informed, which could theoretically give rise to a cause of action for breach of fiduciary duty. However, regardless of the labels given to the theories raised in the complaint, there is but one harm alleged, inadequate representation of plaintiff in criminal proceedings, as such all the wrongs sound in legal malpractice. (See *Lynch v. Warwick* (2002) 95 Cal.App.4th 267, 269-270, 273-274.)

This is because “ ‘the nature of a cause of action does not depend on the label the plaintiff gives it or the relief the plaintiff seeks but on the primary right involved.’ ” (*Khodayari v. Mashburn* (2011) 200 Cal.App.4th 1184, 1190 (*Khodayari*).) Our Supreme Court has described the “primary right theory”—“ ‘a theory of code pleading that has long been followed in California’ ”—as follows:

“ ‘It provides that a “cause of action” is comprised of a “primary right” of the plaintiff, a corresponding “primary duty” of the defendant, and a wrongful act by the defendant constituting a breach of that duty.... [¶] As far as its content is concerned, the primary right is simply the plaintiff’s right to be free from the particular injury suffered. [Citation.] It must therefore be distinguished from the legal theory on which liability for that injury is premised: “Even where there are multiple legal theories upon which recovery might be predicated, one injury gives rise to only

(Mycogen Corp. v. Monsanto Co. (2002) 28 Cal.4th 888, 904.)

Accordingly, just as in *Khodayari*, all the causes of action in plaintiff's Complaint are based on one primary right—the right to competent legal representation. Given this primary right, *Wiley* and *Coscia* require that plaintiff plead and prove actual innocence by first obtaining exoneration of his criminal conviction by postconviction relief in order to proceed with the causes of action alleged in the Complaint. Because plaintiff has not yet been convicted, let alone obtained exoneration of any criminal conviction, however, any proposed amendment would be futile.

Tentative Ruling

Issued By: JYH on 6/27/16.
(Judge's initials) (Date)

Tentative Rulings for Department 403

Tentative Rulings for Department 501

(6)

Tentative Ruling

Re: ***In re: 6029 N. Malsbary Avenue***
Superior Court Case No.: 07CECG01723

Hearing Date: June 29, 2016 (**Dept. 501**)

Motion: Petition for order from court deposit of surplus funds from trustee's sale

Tentative Ruling:

To deny, without prejudice. The Court will require that the declaration of Cathy Rivera be submitted to support the petition.

Any new hearing date must be obtained pursuant to The Superior Court of Fresno County, Local Rules, rule 2.2.1.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: **MWS** **on 6/28/16** .
 (Judge's initials) (Date)

(28)

Tentative Ruling

Re: ***Pevyhouse v. Higgins***

Case No. 15CECG03343

Hearing Date: June 29, 2016 (Dept. 501)

Motion: By Defendant Karen Higgins demurring to the First Amended Complaint brought by Plaintiffs John Pevyhouse and Andrea Franklin.

Tentative Ruling:

To overrule the demurrer in its entirety.

Defendant shall have ten court days to respond to the First Amended Complaint.

Explanation:

A general demurrer admits the truth of all material allegations and a Court will "give the complaint a reasonable interpretation by reading it as a whole and all its parts in their context." (*People ex re. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 300.) The standard of pleading is very liberal and a plaintiff need only plead "ultimate facts." (*Perkins v. Superior Court* (1981) 117 Cal.App.3d 1, 6.) However, a plaintiff must still plead facts giving some indication of the nature, source, and extent of the cause of action. (*Semole v. Sansoucie* (1972) 28 Cal.App.3d 714, 719.)

Breach of Contract

In pleading a breach of contract, a plaintiff must plead: (1) the contract; (2) plaintiff's performance of the contract or excuse for nonperformance; (3) defendant's breach; and (4) the resulting damage to plaintiff. (*Reichert v. General Ins. Co.* (1968) 69 Cal.2d 822, 830.)

Defendant demurs to this cause of action on several grounds: (1) that Plaintiff has not alleged performance by decedent; (2) that Plaintiff has not pleaded a breach of the terms of the contract; (3) that the claim violates the Statute of Limitations; and (4) that it violates the Statute of Frauds.

First, Plaintiff has pleaded generally that Decedent did perform all his duties under the contract. (FAC ¶17.) This is all that is required for a pleading contested by a

demurrer. (*Careau & Co. v. Security Pac. Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1390.) Therefore, the demurrer cannot be sustained on this ground.

Second, the FAC contains allegations that Defendant was required to pay \$600 or more per month as part of the oral contract. (FAC ¶12.) Plaintiffs allege that Defendant made payments from 2010 through 2014. (FAC ¶13.) Plaintiffs then allege that Defendant breached the oral contract “by failing and refusing to respond whatsoever to Plaintiffs’ demands for repayment of all sums due on or before that date [October 2, 2015].” (FAC¶16.)

Defendant asserts that the payment of all sums on the October 2, 2015 date was not alleged to be part of the original oral agreement. (See FAC¶12.) Defendant’s argument points out an ambiguity in the FAC: is the breach the cessation of payments by Defendant in November of 2014, or is the breach the failure to abide by the repayment demand of payment by October, 2015? The first is encompassed by the oral agreement alleged in Paragraph 12, but the agreement to be bound by the 2015 demand is not alleged. It is true that it is unclear as to what breach is being relied on for the breach of contract claim.

Nevertheless, all that is required is that the complaint provide defendant with “notice of the issues sufficient to enable preparation of a defense.” (*Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 549-50.) The plaintiff need only plead such facts as are necessary “to acquaint a defendant with the nature, source and extent of his claims.” (*Id.* at 550.) Likewise, an oral contract may be pleaded generally as to its effect because it is rarely possible to allege the exact words. (*Khoury v. Maly’s of Calif., Inc.* (1993) 14 Cal.App.4th 612, 616.)

Here, Plaintiffs have alleged that there was an agreement to make monthly payments and that the payments ceased in November 2, 2014. Therefore, the Plaintiffs have pleaded an agreement and its breach for purposes of a demurrer.

Third, the Statute of Frauds requires that certain contracts must normally be in writing in order to be enforced, including “[a]n agreement that by its terms is not to be performed within a year from the making thereof.” (Civil Code § 1624, subd.(a)(1).) However, the oral agreement at issue here required Defendant to pay \$600 or more a month. Thus, it was capable of being performed within one year. (*Blaustein v. Burton* (1970) 9 Cal.App.3d 161, 185 (to fall within the statute of frauds “the contract must, by its terms, be impossible of performance within a year.”).) Furthermore, there is authority for the proposition that “where a contract has been fully performed by one party and nothing remains to be done except the payment of money by the other party, the statute of frauds is inapplicable” (*id.*), though it is unclear the extent to which this applies to a simple loan agreement, as here. In any event, the statute of frauds does not appear to apply to this oral agreement, and so the demurrer cannot be sustained on this ground.

Fourth, the Statute of Limitations for an oral contract is two years from the date of the breach of contract. (Code Civ.Proc. §339, para (1).) The FAC contains an allegation that payments were made “through in or about 2014.” (FAC ¶13.)

Therefore, if the oral contract was that monthly payments would be made, that agreement was breached "in or about 2014." The initial complaint was filed on October 27, 2015. Therefore, the complaint is within the two year statute for oral contracts as pleaded.

The Defendant argues in the demurrer that (1) the uncertainty with respect to when the date of breach is intentional, and (2) that because the FAC alleges that "certain monthly payments" were made between 2010 and 2014 that a breach occurred prior to 2014.

Although the exact date the breach occurred could be seen as being uncertain from the face of the FAC, the time when the breach occurred is not an element of the cause of action and, therefore, does not have to be pleaded. (Cf. *United Western Medical Centers v. Superior Court* (1996) 42 Cal.App.4th 500, 505 (demurrer based on statute of limitations lies only where the dates in question are shown on the face of the complaint). Defendant's remedy in this instance is "to ascertain the factual basis of the contentions through discovery and, if necessary, file a motion for summary judgment to eliminate that cause of action should the facts reveal the claim is time barred." (*Id.*) Therefore, the Plaintiffs' failure to clearly plead the date of breach, whether intentional or not, is not fatal to the pleading. Likewise, while the verbiage "certain" does imply that there were instances in which payments were not made, there is still no date on the face of the complaint from which the Court could determine whether the statute of limitations would apply.

Therefore, for all of these reasons, the demurrer to the First Cause of Action is overruled.

Breach of Implied Contract

An implied contract "consists of obligations arising from a mutual agreement and intent to promise where the agreement and promise have not been expressed in words." (*Retired Employees Ass'n. of Orange County, Inc. v. County of Orange* (2011) 52 Cal.4th 1171, 1178.) Defendant's primary argument is that a claim for breach of express contract and one for implied contract are mutually exclusive. While this is true after trial, a plaintiff can still plead these theories in the alternative. (*Mendoza v. Continental Sales Co.* (2006) 140 Cal.App.4th 1395, 1405; *Fleet v. Bank of America N.A.* (2014) 229 Cal.App.4th 1403, 1412-13.) There is therefore no barrier to Plaintiffs pleading these as alternative theories (even if Plaintiffs did not explicitly say that that's what they were doing).

Defendant also argues that Plaintiffs have not alleged no conduct that would suffice to establish the implied contract. However, as Plaintiffs point out, they have alleged that Decedent did provide Defendant certain sums of money and that Defendant made monthly payments. (FAC ¶¶ 20-23.) This would appear to suffice for purposes of inferring an implied contract. (E.g., *Yari v. Producers Guild of America, Inc.* (2008) 161 Cal.App.4th 172, 182.)

Defendant also incorporates the arguments she made with respect to the Oral Contract claim; such arguments fail for the same reasons as above. Therefore the demurrer to the Second Cause of Action is overruled.

Money Lent

Defendant also incorporates the arguments she made with respect to the Oral Contract claim; such arguments fail for the same reasons as above. Similarly, a common count can be pleaded in the alternative. (*McBride v. Boughton* (2004) 123 Cal.App.4th 379, 394 ("where a common count is pleaded as an alternative way of seeking the same relief demanded in a specific cause of action, and is based on the same facts, the common count is demurrable if the cause of action is demurrable.")) Therefore, the demurrer should not be sustained on these grounds, and the demurrer to the Third Cause of Action is overruled.

Promissory Estoppel

The elements of a promissory estoppel claim are "(1) a promise clear and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3)[the] reliance must be both reasonable and foreseeable; and (4) the party asserting the estoppel must be injured by his reliance." (*Advanced Choices, Inc. v. State Dept. of Health Services* (2010) 182 Cal.App.4th 1661, 1672.) Defendants argue that the FAC does not contain a clear and unambiguous promise, that there is no way to determine decedent's state of mind at the time of the promise, and that there was no reliance.

The FAC contains allegations that Defendant promised to pay at least \$600 per month and that, in reliance upon that promise, Decedent paid several of Defendant's debts on demand. (FAC ¶¶ 38-42.) This would appear to suffice for purposes of pleading the elements for promissory estoppel. As for the argument regarding decedent's state of mind, Defendants have pointed to no legal authority for the relevance to the demurrer. Therefore, the demurrer to the Fourth Cause of Action is overruled.

For all of these reasons the demurrer to the First Amended Complaint is overruled in its entirety.

Pursuant to California Rules of Court, rule 3.1312, subdivision (a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: MWS **on** 6/27/16 .
 (Judge's initials) (Date)

(2)

Tentative Ruling

Re: ***In re Rashedia Walker-Brown***
Superior Court Case No. 16CECG01613

Hearing Date: June 29, 2016 (Dept. 501)

Motion: Petition to Compromise Minor's Claim

Tentative Ruling:

To deny without prejudice. Petitioner must file an amended petition, with appropriate supporting papers and proposed orders, and obtain a new hearing date for consideration of the amended petition. (Super. Ct. Fresno County, Local Rules, rule 2.8.4.)

Explanation:

The attorney seeks \$3,750.00 in fees. This figure represents 25% of the gross settlement. The attorney is entitled to 25% of the gross settlement minus costs which is \$3,561.35.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: MWS on 6/27/16 .
 (Judge's initials) (Date)

(5)

Tentative Ruling

Re: ***Jane Doe No. 1 .v Estate of Lance Clement et al.***
Superior Court Case No. 14 CECG 03347 **Lead Case**

Hearing Date: June 29, 2016 (**Dept. 501**)

Motion: By Defendant Orange Center Elementary School
District for summary adjudication

Tentative Ruling:

To continue the hearing to July 6, 2016 at 3:30 p.m. in Dept. 502. This is the Department (the Honorable Donald Black) that has been assigned the consolidated cases and Judge Black will be available on that date. The Code provides that for good cause the Court may set the hearing less than 30 days before trial. [CCP § 437c(a)]

Pursuant to California Rules of Court, Rule 3.1312, subd. (a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: MWS on 6/27/16 .
 (Judge's initials) (Date)

(6)

Tentative Ruling

Re: ***Benitez v. Fresno County Private Security***
Superior Court Case No.: 15CECG03594

Hearing Date: June 29, 2016 (**Dept. 501**)

Motion: Demurrer to complaint by Defendants County of Fresno and 21st District Agricultural Association dba The Big Fresno Fair

Tentative Ruling:

The Court declines to rule on the demurrer, as improperly-noticed, and on its own motion, strikes the first amended complaint filed on June 17, 2016, as not filed in conformance with the laws of the State of California. Defendants shall have 10 days' leave to answer.

Explanation:

The demurrer papers here were not accompanied by a notice of motion, a mandatory document. (Cal. Rules of Court, rule 3.1320(c).) Since the demurrer is unopposed, the defect is not waived. (*Vlahovich v. Cruz* (1989) 213 Cal. App. 3d 317, 320; *Tate v. Superior Court* (1975) 45 Cal. App. 3d 925, 930.)

Beginning in 2016, a party may amend the complaint once, without leave of court, at any time before the answer or demurrer is filed, or after a demurrer is filed but before the demurrer is heard, if the amended complaint is filed and served no later than the date for filing an opposition to the demurrer. (Code Civ. Proc., § 472, subd. (a).)

Here, the demurrer hearing is June 29, 106, meaning that the opposition to the demurrer was due June 16, 2016. (Code Civ. Proc., §§ 1005, subd. (b); 12.) Plaintiff would have had to file and serve his first amended complaint by June 16, 2016. The first amended complaint was not filed and served until June 17, 2016; consequently, the Court strikes it on its own motion as untimely filed. (Code Civ. Proc., §§ 436, subd. (b); 472, subd. (a).)

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: MWS on 6/27/16 .
 (Judge's initials) (Date)

Tentative Rulings for Department 502

Tentative Rulings for Department 503

(2)

Tentative Ruling

Re: ***In re Warren Knight***
Superior Court Case No. 15CECG03898

Hearing Date: June 29, 2016 (Dept. 503)

Motion: Petition to Compromise Minor's Claim

Tentative Ruling:

To grant. Order signed. Hearing off calendar.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: A.M. Simpson on 6/27/16 .
(Judge's initials) (Date)

(23)

Tentative Ruling

Re: ***Jodi Lorang v. Richard Braden***
Superior Court Case No. 16CECG01310

Hearing Date: Wednesday, June 29, 2016 (**Dept. 503**)

Motion: Defendant Richard Braden's Demurrer to Plaintiff Jodi Lorang's Complaint

Tentative Ruling:

To take off calendar Defendant Richard Braden's demurrer to Plaintiff Jodi Lorang's complaint. (Code Civ. Proc., § 430.41, subd. (a).)

The Court orders Plaintiff's and Defendant's counsel to meet and confer in person or by telephone as required by Code of Civil Procedure section 430.41, subdivision (a). If the parties do not reach an agreement resolving the objections raised in the instant demurrer, Defendant may obtain a new hearing date for the instant demurrer. If a new hearing date is obtained, Defendant must file a new meet and confer declaration as required by Code of Civil Procedure section 430.41, subdivision (a)(3), at least 16 court days, plus any additional time as required for service of the declaration, before the new hearing date. If, after meeting and conferring, Plaintiff agrees to amend her complaint, Plaintiff and Defendant may file a stipulation and order for leave to file a first amended complaint, which will be granted by the Court without need for a hearing. (Cal. Rules of Court, rule 3.1207(4); Superior Court of California, County of Fresno Local Rules, Rule 2.7.2.)

Explanation:

On May 20, 2016, Defendant Richard Braden ("Defendant") filed a demurrer to Plaintiff Jodi Lorang's ("Plaintiff") complaint pursuant to Code of Civil Procedure section 430.10, subdivision (e).

In order to prove that Defendant complied with the meet and confer requirement of Code of Civil Procedure section 430.41, subdivision (a) before filing his demurrer, Defendant has filed the declaration of his counsel, J. Jackson Waste. In his declaration, Mr. Waste states that, even though he spoke with Plaintiff's counsel over the telephone, the attorneys did not have time to discuss the substantive issues that Defendant has with Plaintiff's complaint. (Declaration of J. Jackson Waste, ¶ 2.) After Plaintiff's and Defendant's counsel were unable to reconnect by phone, Mr. Waste prepared a detailed letter identifying and discussing what Defendant believes are the legal deficiencies in Plaintiff's complaint and sent the letter to Plaintiff's counsel by mail and e-mail on May 13, 2016. (Waste Decl., ¶ 2 and Exhibit A.) Mr. Waste's letter requested that Plaintiff's counsel contact him to discuss the identified deficiencies by no later than 5:00 p.m. on Wednesday, May 18, 2016. (Waste Decl., ¶ 3 and Exhibit A.) However, as of the time that the declaration was signed, 11:00 a.m.

on May 19, 2016, Mr. Waste had not received any response to his letter from Plaintiff's counsel. (Waste Decl., ¶ 3.)

However, since Code of Civil Procedure section 430.41, subdivision (a) requires that the meet and confer process be conducted "in person or by telephone[.]" Mr. Waste's May 13, 2016 letter fails to establish that Defendant met and conferred with Plaintiff before filing his demurrer. While Mr. Waste asserts that he did speak to Plaintiff's counsel on the phone about the case, Mr. Waste also admits that the attorneys did not discuss the legal deficiencies that Defendant claims are present in Plaintiff's complaint. Therefore, Defendant has failed to establish that he sufficiently met and conferred with Plaintiff before filing his demurrer as required by Code of Civil Procedure section 430.41, subdivision (a).

Accordingly, the Court takes the hearing on Defendant's demurrer off calendar. The Court orders Plaintiff's and Defendant's counsel to meet and confer in person or by telephone as required by Code of Civil Procedure section 430.41, subdivision (a).

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: A.M. Simpson **on** 6/27/16 .
(Judge's initials) (Date)